

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY GERMOL EVANS,

Defendant-Appellant.

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UNPUBLISHED

June 7, 2007

No. 267300

Eaton Circuit Court

LC No. 05-020388-FH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering, MCL 750.110. Defendant was sentenced as a habitual offender, MCL 769.12, to 76 to 180 months in prison. We affirm.

Defendant first asserts that the trial judge violated the Michigan Court Rules and denied him a fair trial by engaging in an ex parte communication with the jury. Because defendant did not properly preserve this issue for appeal, we review for plain error affecting defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

MCR 6.414(B) provides, in relevant part, that a "court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present." Defendant contends the trial court violated this rule by verbally interacting with the jury in response to their request for certain trial materials without discussing this request with counsel. Specifically, during deliberations the jury requested several exhibits be provided. The trial court provided the requested exhibits and informed the jury that their request to access a witness's testimony and the 911 tape would require a short time period for set up but would be made available if the jury desired. The trial court informed the jury of the approximate length of the recordings and indicated that the jury would not be able to ask questions, but merely would have to listen to the testimony in its entirety. Before receiving the jury's verdict, the trial court explained what had transpired off the record in the presence of counsel.

The Michigan Supreme Court in *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990) defined three types of communication:

Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication

carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection was raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice.

Administrative communications include instructions regarding availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial.

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Housekeeping communications are those which occur between a jury and court officer regarding meal orders, rest room facilities, or other matters consistent with general “housekeeping” needs that are unrelated in any way to the case being decided. A housekeeping communication carries a presumption of no prejudice. [*Id.* at 142-144 (emphasis in original).]

The trial court’s communication with the jury in this case was clearly administrative in nature. The statements merely provided “instructions regarding availability of certain pieces of evidence.” *Id.* at 143. The trial court simply explained to the jury that a written statement by the victim had not been admitted as evidence, but that the jury could listen to the victim’s testimony. The trial court thoroughly explained the communication on the record once trial reconvened.

Defendant asserts that he was prejudiced because the “jury was entitled to hear the 911 call, and had counsel been present, he could have objected to the trial court’s discouraging instruction that it would take a long time to set up the CD and that they would have to make another request for the evidence.” However, defendant did not object at any time to the manner in which the judge handled the jury’s request. “Defendant’s failure to object at the time the court addressed the jury or immediately thereafter implies that defendant agreed with the manner in which the judge handled the situation.” *People v Gonzalez*, 197 Mich App 385, 403; 496 NW2d 312 (1992). As such, the administrative communication did not affect defendant’s substantial rights.

Defendant further asserts, “absent a stenographic or contemporaneous written record of the private conversation between the judge and jurors, it is impossible to say exactly what transpired in the jury room,” and that he was denied counsel during a critical stage of his trial. However, the communication simply conveyed the characteristics and availability of certain evidence. The trial judge instructed the jury to alert him if they wanted to review the evidence, letting them know that despite the length of the testimonial evidence, the option was available to them. The benign character of the instruction did not comprise a “critical stage” of the proceeding necessitating defendant’s right to counsel.

Next defendant contends that he was denied due process of law because the show-up identification procedure used by the police was unduly suggestive. Defendant argues that he was denied the effective assistance of counsel by his trial attorney’s failure to seek suppression of the identification. Because defendant failed to preserve this issue below, we review for plain error affecting defendant’s substantial rights. *Hawkins, supra* at 447.

“Due process protects the accused against the introduction of evidence of . . . unreliable pretrial identifications obtained through unnecessarily suggestive procedures.” *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). However, “prompt on-the-scene identifications are reasonable, ‘indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime, and subject to arrest, or merely an unfortunate victim of circumstance.’” *People v Libbett*, 251 Mich App 353, 359; 650 NW2d 407 (2002). Such “confrontations promote fairness by assuring greater reliability.” *Id.* at 361.

Pretrial identification is examined in light of the totality of the circumstances to determine if it was so unduly “suggestive as to have led to a substantial likelihood of misidentification.” *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). “When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of a prior description, the witness’ level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.” *Id.* at 304-305.

In this case, the victim provided a description of defendant and his clothing. Based on the circumstances in which the victim encountered defendant, she had a considerable “opportunity for the witness to view the criminal at the time of the crime” and also identified defendant as the intruder only moments after she viewed him in the clinic. *Colon, supra* at 305. The victim never wavered in her identification of defendant as the intruder. Although posing defendant in front of police car headlights while handcuffed did not show him in a neutral context, “[s]imply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective.” *Id.* at 304.

Defendant next contends that his attorney’s failure to move to suppress the identification denied him the effective assistance of counsel. A failure to move for suppression of inadmissible evidence can be ineffective assistance of counsel warranting relief. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996). Because the identification procedure was permissible, even if defense counsel had moved to suppress the identification, the trial court would not have been required to grant the motion. Accordingly, defendant was not denied effective assistance of counsel.

Defendant asserts he was denied the effective assistance of counsel because his attorney failed to object to the prosecutor’s notice of intent to introduce evidence of other bad acts. Defendant argues that there is a reasonable probability, had his attorney objected to the admission of the other acts evidence, that the result of the proceeding would have been different. Furthermore, defendant contends counsel wrongfully convinced him to waive his constitutional right to testify in his own behalf. Because defendant failed to move for a new trial or evidentiary hearing, our review of defendant’s claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

A right to counsel encompasses the right to “effective” assistance of counsel. US Const Am VI; Const 1963, art 1 § 20; *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Reversal of a conviction is required where counsel’s performance falls below an objective standard of reasonableness, and the representation so prejudices the defendant it deprives him of

a fair trial. *Id.* The defendant must overcome the presumption that counsel's actions were based on reasonable trial strategy. *Id.* Appellate courts will not substitute their judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Davis, supra* at 368.

MRE 404(b) provides, in relevant part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion, not exclusion, and a trial judge is permitted to admit evidence of other acts "whenever it is relevant on a non-character theory." *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Under MRE 404(b), evidence of bad acts may be admitted to show the defendant's plan, scheme or system if there is "such a concurrence of common features that the [bad] acts and the charged acts are naturally explained as individual manifestations of a general plan." *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). These acts must be similar enough to "indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *People v Sabin*, 463 Mich 43, 65-66; 614 NW2d 888 (2000). In this case, the characteristics of the other acts are similar to the charged offense in that they occurred at nighttime, the businesses were situated on a main street, the intruder gained entry into the buildings by breaking, and the intruder appeared to have traveled to and from the scenes on foot. Although these acts are not so unique that they establish a signature trait, there is "such a concurrence of common features that the [bad] acts and the charged acts [can be] naturally explained as individual manifestations of a general plan." *Hine, supra* at 251. Thus, the acts were admissible under MRE 404(b) to prove a plan, scheme, or system and defendant's counsel was not ineffective for failing to object to the offer of other acts evidence.

Defendant further contends that counsel was ineffective because he convinced defendant to give up his right to testify based on his attorney's assertion that if defendant took the stand, plaintiff would present evidence of prior bad acts. The decision regarding what witnesses to call is one of trial strategy, and the failure to call a witness constitutes ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308.

Defendant argues that the result of his failure to testify on his own behalf was that "the prosecutor was allowed to take [the police officers'] biased testimony as 'gospel.'" Defendant points out the fact that he told the officers that he was looking for his keys, and the prosecutor used the fact that a set of keys were found on defendant's person to argue that he lied to police. Defendant merely contends that if he had testified, he would have asserted that the keys on his person were his house keys and not his car keys. However, defendant points to no other

statements he would have made on the stand to establish that he was not involved in the burglary. In contrast, the evidence against defendant was substantial. Defendant was seen leaving the clinic. Defendant attempted to flee and was apprehended nearby only moments after the crime occurred. Defendant matched a physical description of the intruder and was immediately identified at the scene by an eyewitness to the burglary. Finally, this crime matched a common plan or scheme that was apparent in previous burglaries committed by defendant. In light of the overwhelming evidence supporting defendant's conviction, he was not deprived of a substantial defense by the lack of an opportunity to testify in his own behalf.

Affirmed.

/s/ Michael J. Talbot  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter